

MONTANA RIVER AND STREAM PROTECTION ACT

DRAFT VERSION 9/11/2010

BY SENATOR VERDELL JACKSON

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING THE MONTANA RIVER AND STREAM PROTECTION ACT; REQUIRING ADOPTION OF NONREGULATORY BEST MANAGEMENT PRACTICES AND 20-FOOT SPECIAL CARE ZONE, BY LOCAL GOVERNING BODIES, TO APPLY TO CERTAIN AREAS; REQUIRING PASSAGE OF A RESOLUTION OF INTENT AND HEARING PRIOR TO ADOPTION; PROVIDING DEFINITIONS; PROVIDING USES AND ACTIVITIES CONSIDERED TO BE APPROPRIATE AND INAPPROPRIATE WITHIN A BEST MANAGEMENT PRACTICES ZONE; REQUIRING RETENTION OF PRIVATE PROPERTY RIGHTS WITHIN A BEST MANAGEMENT PRACTICES ZONE; REQUIRING THE LOCAL GOVERNING BODY TO DEVELOP AND DISTRIBUTE EDUCATIONAL MATERIALS TO SHORELINE PROPERTY OWNERS AFFECTED BY THE ACT; REQUIRING A LOCAL GOVERNING BODY TO FOLLOW CERTAIN PROCEDURES TO EXPAND OR DECREASE A BEST MANAGEMENT PRACTICES ZONE AND TO COMPENSATE AFFECTED PROPERTY OWNERS UNDER CERTAIN CIRCUMSTANCES; PROVIDING THAT BEST MANAGEMENT PRACTICES ARE NOT REGULATIONS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 11] may be cited as the "Montana River and Stream Protection Act".

NEW SECTION. **Section 2. Legislative findings and intent.** (1) The legislature, mindful of its obligations under Article II, sections 3 and 29, and Article IX, section 1, of the Montana constitution, has enacted the Montana River and Stream Protection Act. It is the intent of [sections 1 through 11] to assist property owners in protecting Montana's rivers and streams from water pollution, to provide the governing bodies of political subdivisions with the necessary powers to protect local rivers and streams, and to ensure that the property rights of property owners are protected while serving this public need.

(2) (a) The legislature finds that the state has a duty and legitimate interest in protecting the integrity of its rivers and streams on behalf of all of its citizens; and, because water knows no boundaries and flows between different local jurisdictions, all changes to the policies provided for in [sections 1 through 11] that are not site-specific must be made by the legislature.

(b) The state wants and expects property owners to be reasonable and prudent in the use of their land. Every shoreline property owner in Montana has an ethical and financial incentive, as well as an environmental and legal responsibility, to protect the waters of the state from pollution. Therefore, the legislature believes that shoreline property owners want to protect and will protect, with few exceptions, the state's waters if they are educated and guided by best management practices.

(c) The state has a duty and legitimate interest in protecting the property rights of Montana property owners.

(d) The purpose of [sections 1 through 11] is both to protect private property rights and to prevent pollution of the state's rivers and streams. Responsibility is placed on the property owner to use these nonregulatory best management practices and maintain the best management practices zone on the property owner's property to prevent water pollution.

(3) The legislature recognizes that every river and stream and every reach of every river and stream may present different challenges to furthering the goals of [sections 1 through 11] and that for any practice to be effective in protecting Montana's rivers and streams, sound, site-specific science must be employed as the foundation upon which any new best management practices are based. The site-specific variables that may impact the effectiveness of new practices for the purpose of protecting water quality may include:

- (a) stability and slope of banks;
- (b) soil types near rivers and streams;
- (c) watershed geology;
- (d) depth to ground water;
- (e) size of drainage basin;
- (f) types of vegetation;
- (g) channel morphology;
- (h) velocity of water flow; and
- (i) type and characteristics of the aquifer near rivers and streams.

(4) It is the purpose of [sections 1 through 11] to give local governments the ability, in accordance with the intent of [sections 1 through 11], to protect public health and safety as well as the private property rights of shoreline property owners.

NEW SECTION. Section 3. Definitions. As used in [sections 1 through 11], unless the context clearly indicates otherwise, the following definitions apply:

(1) "Best management practices zone" means an area of land adjacent to a river or stream in which special care should be exercised by the property owner to control water pollution.

(2) "Hazardous substances" means substances that by their nature are dangerous to handle or dispose of or are a potential environmental contaminate and includes petroleum products, pesticides, herbicides, chemicals, and biological wastes.

(3) "Local governing body" means a unit of local government authorized to administer the provisions of Title 76, chapter 3.

(4) "Political subdivision" means an incorporated city or town or a county.

(5) "Mean high-water mark" means the line that water impresses on the land for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above the line. Characteristics of the area below the line include, when appropriate, deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural value.

(6) "Shoreline" means the edge, at the mean high-water mark, on both sides of a river or stream.

(7) "Shoreline property owner" means a person whose private property will be affected or its use conditioned by a best management practices zone adopted under [section 5].

(8) "River" means a natural, flowing body of water that empties into another body of water such as a lake or channel.

(9) "Stream" means a natural perennial flowing body of water that, if in the absence of diversion, impoundment, appropriation, or extreme drought, flows continuously at all seasons of the year and during dry as well as wet years.

(10) "Wetlands" means those areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include marshes, swamps, bogs, and similar areas.

NEW SECTION. Section 4. Best management practices zone jurisdiction. Best management practices zones adjacent to rivers and streams adopted as required under [section 5] do not apply to irrigation districts.

NEW SECTION. Section 5. Best management practices zone -- adoption required -- hearing required -- review of existing regulations. (1) Within 2 years of [the effective date of this act], a local governing body of a political subdivision shall pass a resolution of intent to adopt and implement

best management practices as provided in [section 6] and the establishment of a best management practices zone that, except as provided in [sections 9 and 10], includes the area within 20 horizontal feet of the mean high-water mark of rivers and streams within the local governing body's jurisdiction.

(2) Within 30 days of the passage of the resolution, the local governing body shall hold a hearing on the resolution. Notice of the hearing must be given as provided in 7-1-2121 or 7-1-4127. Best management practices shall be adopted and a best management practices zone shall be established within 30 days after conclusion of the hearing.

(3) A local governing body that has adopted regulations governing building and development in areas adjacent to rivers and streams shall, within 2 years of [the effective date of this act], review the regulations, determine if the regulations are in compliance with the best management practices adopted as required in these sections, and amend the regulations to comply with [sections 1 through 11] if necessary, in order to protect the rivers and streams adjacent to the best management practices zone from pollution.

NEW SECTION. Section 6. Best management practices zone uses and activities. (1) For pollution control and safety, a best management practices zone is hereby adopted on all rivers and streams in Montana. This zone addresses several valid health and safety issues, such as protecting water quality, while also protecting private property rights. Responsibility is placed on the property owner to be a good steward of the land by using nonregulatory best management practices to control pollution of water. Except as provided in subsection (2), the following nonregulatory best management practices shall be implemented for the best management practices zone that includes the area within 20 horizontal feet of the mean high-water mark of rivers and streams:

(a) Erecting permanent residential buildings within the 20-foot best management practices zone may cause detrimental impacts. Permanent structures are generally not appropriate in the best management practices zone, with exceptions such as pump houses, docks, and other structures listed in this section, and as specified in Section 10 of this act.

(b) Comply with regulations governing the storage, handling, application, and disposal of hazardous substances, including:

(i) following all label instructions; and

(ii) avoiding storage of hazardous substances, fertilizer, petroleum products, vehicles, and other sources of pollution in the best management practices zone.

(c) Develop a contingency plan for hazardous substances spills, including cleanup procedures and notifications to the Department of Environmental Quality.

(d) Implement an integrated approach to weed and pest control, including manual, biological, mechanical, preventive, and chemical means for eliminating noxious weeds.

(e) Apply chemicals during appropriate, generally calm and dry weather conditions and during the optimum time for control of the target pest or weed in order to enhance effectiveness and prevent transport into rivers and streams,

(f) Design ingress and egress to the best management practices zone on stable areas to minimize soil erosion. Avoid wet areas, including moisture-laden or unstable toe slopes, seeps, wetlands, wet meadows, and natural drainage channels.

(g) Retain an area for emergency access, maintenance, construction, and other activities, without unnecessarily entering or disturbing the river or stream.

(h) Disperse runoff by using sediment catch basins, rocks, and other means to slow the flow, including the use of French drain pipes or other techniques to disperse runoff from buildings.

(i) Provide an adequate filtration zone to filter the water before it flows into the river or stream and avoid excavating gravel, sand, or soil out of the best management practices zone.

(j) Stabilize, where appropriate, erodible or exposed soils by seeding, compacting, riprapping, benching, mulching, or other suitable means and planting protective vegetation and trees in disturbed areas.

(k) Place debris, overburden, and other waste materials associated with construction and maintenance activities in a location to avoid entry into the river or stream.

(l) Minimize the number of roads in or near the best management practices zone. Reduce disruption of the natural drainage patterns when roads or driveways are in the zone or in close proximity to the zone. Use appropriate road surfacing materials on the road crown. Minimize sediment by providing for adequate drainage of water and using dispersal techniques.

(m) Fit the road to the topography by locating it on natural benches and following natural contours. Avoid long steep road grades when possible.

(n) Locate the road on stable ground, including well-drained soil.

(o) Install culverts, if necessary, at the gradient of the original ground slope. Armor outlets with rock or anchor downspouts to carry water safely across the fill slope.

(p) Provide energy dissipaters such as rock piles to reduce erosion at the outlet of drainage features.

(q) Periodically inspect and maintain the erosion features in the best management practices zone.

(r) Keep slope stabilization and erosion and sediment control work current with road construction. Grade road surfaces only as often as necessary to maintain a stable running surface and adequate surface drainage.

(s) Avoid operating a motor vehicle across a river or stream or within the best management practices zone unless a bridge or other structure is used to keep the vehicle from entering the water. Cross rivers or streams at right angles to the main channel if practical. Adjust road grade to avoid the concentration of road drainage at river and stream crossings, including direct drainage flows away from the river or stream crossing site or into an adequate filter, such as gravel.

(t) Use culverts, bridges, and stable or reinforced fords to avoid unimproved river and stream crossings when location is appropriate.

(u) Minimize river or stream channel disturbances and related sediment problems during construction of roads and installation of river or stream crossing structures. Do not place erodible material into river or stream channels. Remove stockpiled material from high-water zones. Time construction activities to protect fisheries and water quality.

(v) Where there is an option for removal or relocation from the best management practices zone, relocate sewer lines to comply with current state code requiring sewer lines to be at least 50 feet from the shoreline.

(w) Under the Natural Streambed and Land Preservation Act of 1975, provided in Title 75, chapter 7, part 1, any activity that would result in physical alteration or modification of a perennial rivers and stream, its bed, or its immediate banks must be approved in advance by the supervisors of the local conservation district. Permanent or temporary river and stream crossing structures, fords, riprapping or other bank stabilization measures, and culvert installations on rivers and perennial streams are some of the projects subject to permits under Title 75, chapter 7, part 1.

(2) (a) Site-specific problems such as high ground water, wetlands, flood danger, and unstable soil may merit distances greater than 20 feet to be adopted pursuant to [section 9] for permanent buildings.

(b) Unique site characteristics may merit a shorter distance for building purposes than the minimum 20 feet as described in subsection (1)(a) and specified in [Section 10].

(3) The following uses and activities are considered to be appropriate in the best management practices zone and shall be consistent with best management practices adopted by a local governing body:

- (a) vegetation management, including management for wildland fire hazard mitigation and wildland fire protection, for access, to mitigate effects of erosion, and for aesthetic improvements;
- (b) normal agricultural use by farmers, ranchers, or others, including securing water from the river or stream or providing water for livestock if it is done in a manner that minimizes pollution;
- (c) use of lawn furniture, picnic tables, benches, and other common yard furnishings if they are not permanently installed;
- (d) lawful use of land and buildings that existed on or prior to [the effective date of this act], including:
 - (i) reconstruction, replacement, or repair of an existing onsite wastewater disposal facility if the updated facility is no closer to the river or stream than the original facility; and
 - (ii) reconstruction or repair of a building that is destroyed or damaged by accidental causes if the original perimeter of the building is not exceeded and if the reconstruction or repair is begun within 2 years of the date the destruction or damage occurred;
- (e) any use conducted on property pursuant to a hydroelectric project license issued by the federal energy regulatory commission or located within the licensed project boundary as determined by the federal energy regulatory commission;
- (f) structures and equipment used to collect and transport water from a river or stream for agricultural, domestic, municipal, or industrial uses, including diversion and intake structures, pipes, pumps and pump houses, and related facilities and equipment, provided that oil and other operation and maintenance compounds are prevented from entering the best management practices zone and that filters are installed on intake structures to prevent intake of fish;
- (g) structures and infrastructure associated with water-related recreation, including but not limited to docks, decks, marinas, retaining walls, riprap, boat ramps, and fishing access sites as permitted by the United States Army Corps of Engineers and other agencies, such as local conservation districts;
- (h) filling with nonorganic material for highway, street, and railway embankments not associated with river or stream crossings if reasonable alternative transportation routes outside the best management practices zone are not available and if any encroachment is located as far as possible from the river or stream channel;
- (i) repair and improvement of existing roads;
- (j) temporary placement of equipment or scaffolding engaged in construction or repair of facilities or structures on the property; and
- (k) commercial forest practices subject to the provisions of Title 77, chapter 5, part 3.

(4) An owner of property within a best management practices zone is not responsible for the control of erosion from natural occurrences such as floods, runoff, and a river or stream's natural tendency to meander. Placement of riprap or other material to stabilize a bank or prevent erosion is allowed and is subject to the appropriate permits required by law.

NEW SECTION. Section 7. Private property rights within best management practices zone.

Best management practices adopted pursuant to [section 5] and the establishment of a best management practices zone may not be construed to grant or imply granting public access to private property or to property above the mean high-water mark.

NEW SECTION. Section 8. Notification and education required. Upon adoption of best management practices and the establishment of a best management practices zone, the local governing body shall develop and distribute educational materials regarding the best management practices to private property owners whose property is located within a best management practices zone. An educational campaign shall be implemented to help property owners become knowledgeable of best management practices and the penalties for violating provisions of Title 75, chapter 5.

NEW SECTION. Section 9. Best management practices zone beyond 20-foot limit authorized -- requirements -- compensation for loss to property owner. (1) (a) Upon passage of a resolution of intent, holding a hearing to accept public comment, and reviewing the comments, a local governing body may expand the best management practices zone beyond 20 horizontal feet from the mean high-water mark if:

- (i) the requirements of [section 5] have been met;
- (ii) the local governing body has determined that an additional distance is needed to protect the water quality and integrity of rivers or streams within its jurisdictional boundaries, as evidenced by site-specific, peer-reviewed scientific studies that are made available at the hearing and incorporated into the hearing record;
- (iii) the local governing body has estimated the costs that shoreline property owners are likely to incur as a result of the expansion; and
- (iv) the local governing body produces written findings to support its determination that the expansion of the best management practices zone is warranted. The findings must include

references to the studies required under subsection (1)(a)(ii), the local governing body's cost estimate required under subsection (1)(a)(iii), and any additional local information upon which the local governing body relied to make its determination to increase the width for building purposes. The burden and cost of producing the findings may not be transferred to the property owners.

(b) A best management practices zone must be the minimum necessary to accomplish the intent, findings, and policy of [sections 1 through 11].

(2) (a) A local governing body that intends to expand the best management practices zone beyond 20 horizontal feet from the mean high-water mark without providing findings and site-specific information as required under subsection (1)(a)(iv) shall compensate the affected shoreline property owners for any monetary losses associated with the expansion, including present and future monetary loss associated with reduction of use of the land.

(b) If the local governing body and a shoreline property owner disagree about the amount of compensation to which the shoreline property owner is entitled as a result of expansion of the best management practices zone, an arbitration panel shall determine the appropriate amount. The panel shall consist of a real estate professional, a land appraiser, and one person mutually agreed upon by the shoreline property owner and the local governing body. The decision of the arbitration panel is final unless the property owner or the local governing body appeals the decision to the court of record within 30 days of the decision.

(3) In order to avoid expense to taxpayers, to protect property owners from inadequate compensation for loss of property usage and property rights, and to avoid "takings" law suits, property owners and local jurisdictions seeking to extend the BMP Zone beyond 20 feet or create an extended "riparian" zone are encouraged to work with established conservation groups to voluntarily create easements or covenants and to voluntarily agree to receive full and adequate compensation for related loss of property usage and property rights.

NEW SECTION. Section 10. Best management practices zone less than 20-foot limit authorized -- requirements -- site-specific hardship. (1) Upon passage of a resolution of intent, holding a hearing to accept public comment, and reviewing the comments, a local governing body may decrease the best management practices zone to less than 20 horizontal feet from the mean high-water mark if:

(a) the requirements of [section 5] have been met;

(b) the applicant provides information that the local governing body considers necessary to evaluate the request, including but not limited to plans, maps, and specifications detailing the request;

(c) the literal application of the 20-foot zone would result in a unnecessary hardship to the property owner as a result of circumstances unique to the parcel, including but not limited to size, shape, topography, or location;

(d) the hardship referred to in subsection (1)(c) is not the result of the actions of the applicant; and

(e) the conditions of the request can be made consistent with the general purpose and intent of [sections 1 through 11] and the request is not likely to adversely impact water quality, increase river or stream bank erosion, or increase flood heights or velocity.

(2) If the provisions of [sections 1 through 11] preclude the construction of structures on an otherwise developable parcel in existence on [the effective date of this act], the local governing body shall find that an unnecessary hardship exists. Upon the applicant's compliance with subsection (1), the local governing body shall approve the request.

NEW SECTION. Section 11. Owner responsible for building where conflicting findings exist.

In the case where there is conflicting scientific information and findings, and where the property owner chooses to build and is not prohibited from building in a potentially "at risk" location, then the property owner shall sign a waiver accepting all risk and responsibility for all damage caused by natural events and accepting all related costs for mitigation.

NEW SECTION. Section 12. Best management practices zone -- consequences for degradation of water quality. Adherence to the uses and activities consistent with best management practices as provided in [section 6] in the best management practices zone will likely prevent pollution, as defined in 75-5-103. However, best management practices adopted pursuant to [sections 5 and 6] are not regulations. Property owners are responsible for any pollution or degradation of the water. If a property owner is proven to have degraded Montana water, the property owner is subject to remedies, fines, and penalties appropriate for proven degradation. The provisions of Title 75, chapter 5, and any other appropriate state and federal laws, rules, regulations, and permitting requirements apply to property owners within a best management practices zone.

NEW SECTION. Section 13. Codification instruction. [Sections 1 through 11] are intended to be codified as an integral part of Title 76, and the provisions of Title 76 apply to [sections 1 through 11].

NEW SECTION. Section 14. Effective date. [This act] is effective on passage and approval.